

## OUTSIDE COUNSEL

## Expert Analysis

# Strategies for Defending Low-Impact Collisions With Fusion Surgeries in NY

**T**he spread of fusion surgeries in personal injury cases in recent years, in New York and across the country, has been remarkable. More and more plaintiffs are undergoing cervical and lumbar fusion surgeries. Even in cases involving very minor motor vehicle collisions, and questionable causation claims, the odds of a verdict in plaintiff's favor is substantial. Juries frequently agree with plaintiffs and their experts that fusion surgeries are causally related, even to a low-impact collision event.

In view of the growing importance of defending these claims, this article will explore updated strategies for defending low-impact collisions and fusion surgeries in New York. We will examine the usual toolkit of expert trial presentations, and potential strategies for improving that formula. We will then discuss novel approaches, such as video and computer simulation reconstruction for use during trial.

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### The Typical Approach

The standard defense is essentially to hire a well-credentialed biomechanical engineer and orthopedic surgeon, and present their testimony to the jury on the issues of medical necessity and causation. Ideally, the expert testimony will be supplemented with vehicle photographs and damage estimates, along with any available lay testimony, in support of the defendant's position that the collision event was too minor to cause the fusion surgery or surgeries. Testimony from an accident reconstruction expert may also be presented.

This strategy is often ineffective. The plaintiff's bar is adept at presenting testimony from their own biomechanical engineer, accident reconstruction expert, and medical professionals (frequently the plaintiff's

own treating surgeon). The plaintiff's surgeon will often be more persuasive regarding causation, because he or she has the benefit of having personally seen the plaintiff's spine during surgery. Their opinion of a traumatically-induced injury is more persuasive than a defense physician who never saw the inside of the plaintiff's spine up close, and is instead relying on a physical examination done long after the fact, as well as diagnostic studies (and, possibly, photographs taken during the surgery).

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The defense bar must improve its defense of these claims in order to effectively compete.

Faced with lengthy, confusing and competing expert narratives, and a very sympathetic plaintiff, juries will frequently side with the plaintiff on the question of medical causation. Even if certain other evidence (such as minimal vehicle damage) is overwhelming, and even if the defense has the edge in a strictly scientific sense, many science-heavy presentations fail

to make a favorable impression on a lay jury. Defense attorneys are therefore trying to improve the standard formula for defending these cases.

### Alternative Strategies

Some proposals are as follows. *First*, ensure that the defense biomechanical engineer and orthopedic surgeon are working together. They should review each other's reports and, ideally, reach a consensus on their findings well in advance of trial. They must communicate with each other and be aware of each other's expertise, evidence relied upon, and factual determinations.

Although New York law is trending towards greater admissibility of biomechanical opinion,<sup>1</sup> the biomechanical engineer is still subject to challenge on the ground that he or she is not a doctor. Their opinion is not worth as much as a physician. However, if the experts are working together and in a coordinated fashion, the biomechanical engineer can defer to the orthopedist regarding strictly medical issues. Likewise, the orthopedic surgeon can defer to the engineer regarding the finer points of biomechanics. If an accident reconstruction expert is also retained, he or she can also join in this collaborative process.

By contrast, presenting expert testimony in which the respective experts are uncoordinated, and unaware of the science behind each other's findings, can only undermine the jury's confidence in their determinations and generate material for the plaintiff's side during cross-examination.

*Second*, retain the experts at a much earlier stage of the litigation than is usually done. They are typically

retained after the plaintiff's deposition. The better practice, in many cases, is probably to retain them earlier. Although this is more costly in the short run, it is probably more cost-effective in the long run. The defense will have an edge if expert advice and input is obtained prior to the plaintiff's deposition, so that targeted questions can be asked during the plaintiff's deposition. It is recommended that the experts be retained approximately when the bill of particulars is served (or once it is determined that a fusion surgery has happened, or will likely happen).

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In the right case and under the best of conditions, these methods could even result in a favorable summary judgment ruling on the question of causation.

Biomechanical engineers, for example, can generate lists of specific questions that should be asked during the plaintiff's deposition—questions that are geared toward medical causation and the finer points of biomechanics. Certain questions are specific to the models of vehicles involved, and can only be brought to the attention of defense counsel through timely expert input. The orthopedic surgeon and accident reconstruction expert, likewise, can offer valuable input that can be used during the plaintiff's deposition to flesh out as much as possible the mechanics of medical causation, how the accident occurred, and the specifics of the forces at work on plaintiff's body. Asking the right, detailed questions at the depositions

of all parties and witnesses, informed in advance with expert input, can only improve the odds of a successful defense at trial. Of course, if the results indicate that plaintiff has a strong case that the injuries were in fact causally related, that risk will be known far in advance of trial, rather than discovered for the first time during trial.

*Third*, make all efforts in the discovery and investigation phase to obtain all available evidence requested by the experts in support of their theories, and to support the admissibility of their testimony. Admissibility and persuasiveness go hand-in-hand.

For example, the case law in New York imposes certain standards for the admissibility of a biomechanical engineer's opinion.<sup>2</sup> The case law helpfully provides a shopping list of items to obtain in support of the engineer's testimony: vehicle specifications, vehicle inspection information, damage estimates and reports, photographs, repair records, scientific articles, specific deposition questions for lay and party witnesses, and possibly also photographs recreating the position of the plaintiff's body within the same vehicle (or an exemplar), at the moment of impact.

Vigorously pursuing every item on that shopping list can only assist the defense. The more evidence that can be obtained during discovery and investigation, in response to the experts' specific requests, the better supported the expert's testimony will be. The more items on the shopping list that are obtained, the more difficult it will be for the trial judge to preclude the trial testimony

of defendant's experts, particularly the biomechanical engineer.

Parenthetically, those same admissibility standards can be used, in the right case, to preclude or limit the testimony of plaintiff's experts. Although judges vary in how rigorously they apply the admissibility standards, in the right case a plaintiff's biomechanical engineer will be precluded if their scientific analysis falls short under the case law. It sometimes happens that the plaintiff's biomechanical expert has significant gaps in their analysis which fall short of the admissibility standards. In such a case, a trial motion should result in the preclusion or limiting of the expert's trial testimony. If the motion is denied, at least a good issue has been preserved for appellate review.

Another commonly-used method is to maintain a database of trial testimony of any plaintiff's experts who testify frequently. These transcripts can be used to cross-examine the experts, with the goal of challenging the soundness and reliability of their methodologies and opinions.

In the right case and under the best of conditions, these methods could even result in a favorable summary judgment ruling on the question of causation. Although such a result is very rare, summary judgment on this issue is possible under New York's "serious injury" threshold law (see Insurance Law 5102(d)), if the court finds no question of fact on medical causation.

What are some of the more unconventional strategies to defend these claims?

One novel approach would be to commission a reconstruction of the

actual collision event, using a crash test dummy and the same (or exemplar) vehicles in a controlled environment, performed by qualified professionals. If photographs of the damage to the actual vehicles are available, the reconstruction would attempt to reproduce the same amount of damage to the same (or exemplar) vehicles. The jury could then be shown the video of the reconstruction, in an attempt to convince them that the impact was simply too minor to have caused the major injuries and fusion surgeries claimed.

The problem with this option is cost: One expert gave a preliminary estimate of \$100,000. In the right case, however, this method might be cost effective in the long run.

Another, similar approach would be to commission a computer simulation of the collision event, again with the goal of convincing the jury that the impact was very minor. This method would be more subject to an admissibility challenge by the plaintiff, but could be an asset at trial.

The benefit of using video and computer simulations is obvious: their simplicity. A significant problem in this area is that many jurors will become confused and bored by extensive, complicated expert testimony that goes on for days. Many jurors will simply throw up their hands and rule in plaintiff's favor as the more sympathetic party. The two sides' experts essentially cancel each other out. Moreover, accepting the defense's theory of the case may even require the jury to brand the plaintiff a liar or malingerer, and many juries are simply unwilling to go that far, on the basis

of expert testimony that is dense and difficult to comprehend. The nuances and complexities of expert testimony may be lost on these juries, and in such a case all the expense and effort that went into their preparation will be wasted.

By contrast, everyone grasps the simplicity of videos, and, if they are accurate, they will clearly convey the defense's point that the impact was very minor. Defense counsel can tell the jurors to forget the experts and rely on their own common sense with regard to the force of the impact as seen in the video. Counsel might be able to cut through the clutter and noise of the expert testimony and present a much more straightforward narrative for the jury's consideration.

## Conclusion

Whatever the effectiveness of these techniques, it is certain that these claims will continue to proliferate. The defense bar must improve its defense of these claims in order to effectively compete. The foregoing techniques are one attempt to answer that challenge.

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1. In general, New York law is trending in the direction of greater admissibility of biomechanical testimony at trial. *Aspromonte v. Judlau Contr.*, 2017 NY Slip Op. 31091 (Sup. Co. New York Co. 2017); *Valentine v. Grossman*, 283 A.D.2d 571 (2d Dept. 2001); *Cocca v. Conway*, 283 A.D.2d 787 (3d Dept. 2001); *lv. den.*, 96 N.Y.2d 721 (2001); *Martell v. Chrysler*, 186 A.D.2d 1059 (4th Dept. 1992).

2. One of the best cases to discuss these requirements is *Singh v. Siddique*, 2016 N.Y. Slip Op. 50987(U), 52 Misc.3d 1204(A) (Sup. Ct. Kings Co. 2016).